STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2010
v	No. 291585 Wayne Circuit Court
PHILLIP CALLOWAY, Defendant-Appellant.	LC No. 08-007323

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant was found guilty by a jury of one count of second-degree murder, MCL 750.317, two counts of assault with intent to murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to a two-year term of imprisonment for the felony-firearm conviction, and 40 to 60 years of imprisonment for the second-degree murder and assault with intent to murder convictions. Defendant appeals as of right. We affirm.

This case arises out of a Mother's Day 2008, celebration that ended with defendant firing a gun out of a truck window in the direction of several individuals standing on a porch, fatally injuring one of them. Defendant claims he acted in self-defense, as he believed he was being shot at by one of the individuals on the porch.

Defendant first argues that there was insufficient evidence introduced at trial to support his conviction for second-degree murder. We disagree. The standard of review on a challenge to the sufficiency of the evidence is de novo. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). The jury is the sole judge of the credibility of the witnesses and the weight of the evidence. *Id*. at 378. Consequently, a reviewing court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

To prove second-degree murder, the prosecution must prove that: 1) a death occurred, 2) the death was caused by the defendant, 3) the killing was done with malice, and 4) the killing was without justification or excuse. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). Malice is the intention to kill, do great bodily harm, or create a high risk of death or

great bodily harm with knowledge that such is the probable result. *Id*. See also *People v Gillis*, 474 Mich 105, 138; 712 NW2d 419 (2006).

Defendant claims that he acted in self-defense. A homicide is justifiable if, under all of the circumstances, the defendant honestly and reasonably believed that he was in imminent danger of death or serious bodily harm and that it was necessary for him to exercise deadly force. MCL 780.972[1]; *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *James*, 267 Mich App at 677 (quotation marks and citation omitted).

Looking at the evidence in the light most favorable to the prosecution, the prosecution introduced sufficient evidence to allow a reasonable jury to convict defendant of the crime of second-degree murder. There is no question that defendant caused the victim's death. Defendant's intent to kill the victim, do great bodily harm to the victim, or create a high risk of death or great bodily harm with knowledge that such is the probable result can be implied from the fact that he shot towards the porch on which several individuals were standing. Accordingly, the killing was done with malice.

Likewise, defendant's claim of self-defense is unsustainable. The prosecution's witnesses testified that the victim was unarmed, as were the people standing on the porch. No witness corroborated defendant's story that he had been shot at. Moreover, the physical evidence does not corroborate defendant's testimony. For instance, there were no bullet holes in defendant's truck, and the only bullet casings all came from the same manufacturer. Viewing these facts in the light most favorable to the prosecution, sufficient evidence was presented to allow a reasonable jury to convict defendant of second-degree murder.

Defendant also argues that the prosecutor committed misconduct by violating defendant's constitutional protection against self-incrimination by cross-examining defendant about his silence after the shooting. We disagree.

When challenges alleging prosecutorial misconduct are properly preserved at trial, as they were in this case, such challenges are reviewed de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Questions of constitutional law are also reviewed de novo. *People v Echavarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999). If a constitutional question was properly preserved for appeal, an error will not require reversal if the prosecution proves beyond a reasonable doubt that the error was harmless. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008). Error "is harmless if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (quotation marks and citations omitted).

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. This

[1] Defendant's duty to retreat is not at issue in this case.

amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. US Const, Am XIV; Const 1963, art I, § 17. When a criminal defendant is arrested, he is to be given his "*Miranda*[2] warnings" as a prophylactic measure to protect him against incriminating himself. *Doyle v Ohio*, 426 US 610, 617; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Once the defendant has been told, by means of the *Miranda* warnings, that he has a right to remain silent, it would be fundamentally unfair and would violate due process to use his silence against him. *Id.* at 618. Thus, once a defendant is arrested and given his *Miranda* warnings, he cannot be impeached during cross-examination regarding his failure to say anything to the police. *People v Borgne*, 483 Mich 178, 187; 768 NW2d 290 (2009), citing *People v Bobo*, 390 Mich 355, 359-361; 212 NW2d 190 (1973). A defendant, however, may be cross-examined regarding his failure to say anything to the police before his arrest if it would have been "natural" for him to report something to the police. See *People v Collier*, 426 Mich 23, 31, 34-36; 393 NW2d 346 (1986).

The prosecutor asked defendant the following questions as to why he failed to tell the police before he was arrested and received his *Miranda* warnings that he had been shot at:

> *Q*. Did you tell Amanda, Amanda, take me to the police those people tried to kill me, they tried to hurt me, take me to the police so I can tell this to the police department? Did you do that?
>
> * * *
>
> *Q*. After you defend yourself because Jeremy produced a gun and he shot at least twice at you, you didn't go to the police and let 'em know that this man tried to kill me?
>
> * * *
>
> *Q*. So was there ever a point that you said, well, I had to go to the police and tell 'em this man tried to kill me out there?
>
> * * *
>
> *Q*. You never made it to the police to tell them that, did you?

These questions are all limited in scope, inquiring whether defendant approached the police and told the police that he had been shot at. They all ask defendant whether he voluntarily approached the police. They do not ask about what he told the police, or failed to tell the police, after he had been arrested and given the *Miranda* warnings. Moreover, as was the case in *Collier*, it would seem to have been natural for a person to tell the police that he had been shot at. In light of defendant's claim of self-defense, these were fair questions to ask him. Consequently, these questions do not violate defendant's due process rights.

[2] *Miranda v Arizona*, 384 US 436, 467-473; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The prosecutor, however, also asked these questions, which present a closer case:

Q. Did you talk to anyone after this incident or any arresting officer regarding this incident?

A. No, sir.

Q. Okay. You never talked to anyone?

A. No officers.

Q. No officers. Okay, you're sure about that?

Defense Counsel: I'm going to object, your honor. May we approach?

In this series of questions, the prosecutor asked questions that were arguably prohibited by *Bobo*, 390 Mich at 359-361. Specifically, the prosecutor, referencing an arresting officer, asked defendant: "You never talked to anyone?" By inquiring about defendant's conversations with an arresting officer and using the word "never," the prosecutor's questions were not limited merely to defendant's pre-arrest silence, but could also implicate post-arrest and post-*Miranda* silence.

Although the prosecution's questions arguably violated *Bobo*, the prosecutor did not specifically ask about defendant's post-arrest, post-*Miranda* silence. It is instructive to contrast this case with *Borgne*. In that case, the prosecutor asked the defendant specifically whether he had been arrested, received *Miranda* warnings, and was aware that he "had the opportunity to give your version of the events?" *Borgne*, 483 Mich at 188-189. The prosecutor repeatedly questioned the defendant about why he failed to give his side of the story after he was in custody. *Id.* at 189-191. The prosecutor then referred to this line of questioning, and the defendant's responses, in closing argument. *Id.* at 191. The Court in *Borgne* pointed out that the prosecutor knowingly and explicitly asked questions about the defendant's silence after he had been given his *Miranda* warnings. *Id*. This case is markedly different. Here, the prosecutor asked a few questions that could arguably be interpreted to implicate his post-*Miranda* silence.

Likewise, this case is very different from *People v Shafier*, 483 Mich 205; 768 NW2d 305 (2009). In that case, during the opening statement, the prosecutor alluded to the fact that the defendant said nothing to the police. *Id*. at 215. Later, the prosecutor asked the arresting officer whether the defendant made any statements after the defendant was given his *Miranda* warnings. *Id*. at 215-216. On cross-examination, the prosecutor asked the defendant "[y]ou didn't say a single word about being arrested for criminal sexual conduct. Is that right?" *Id*. at 216-217. During his closing argument, the prosecutor again made reference to the defendant's silence. *Id.* at 217. Here, the prosecutor made no reference to defendant's silence in his opening statement, closing argument, or rebuttal. Because the prosecutor's brief questioning that potentially implicated defendant's post arrest, post-*Miranda* silence was minimal, there was no violation of *Bobo* in this case. See also *id*. at 217-218.

Even if the questions under consideration violated *Bobo*, they constitute harmless error. There were only a handful of possibly improper questions during the course of a three-day trial. Aside from these questions, the prosecutor made no other references to defendant's post-

Miranda silence. Moreover, the prosecution's case is strong, even without these questions. The testimony of all four of the prosecution's eyewitnesses was largely consistent despite heavy drinking and drug usage by three of those four witnesses. In addition, the physical evidence, such as the absence of bullet holes in the truck after the shooting, largely corroborates the testimony of the prosecution's witnesses. Finally, defendant's testimony was contradicted by many credible sources. He testified, for instance, that he left the gun on the passenger seat of the truck. No such gun was found. For these reasons, a rational jury would have found defendant guilty beyond a reasonable doubt despite this possible error. Therefore, any error was harmless. See *Shepherd*, 472 Mich at 347.

Accordingly, we find that the prosecutor did not commit misconduct and that defendant's constitutional rights were not violated. Even if his rights had been violated, the error was harmless.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering